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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

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9 JEFFREY SCOTT DEPENBROCK,

Case No. 2:12-cv-01327-RFB-CWH

10 Petitioner,

ORDER

11 v.

12 D.W. NEVEN, et al.,

13 Respondents.

14 This counseled second-amended 28 U.S.C. § 2254 habeas petition by petitioner
15 Jeffrey Scott Depenbrock is before the court for adjudication on the merits (ECF No.
16 39).

17 **I. Background & Procedural History**

18 On July 12, 2007, Depenbrock pleaded guilty in state case no. C235011 to
19 possession of credit or debit card without cardholder's consent (exhibit 9).¹ He also
20 pleaded guilty to possession or sale of document or personal identifying information to
21 establish false status or identity in case no. C234564. *Id.* The State agreed to dismiss
22 two other cases and had no objection to Depenbrock's release on his own recognizance
23 after entry of the plea. *Id.* Pursuant to the guilty plea the parties stipulated to a 5 to 20-
24 year sentence under the small habitual criminal statute; however, if Depenbrock failed
25 to appear for sentencing, the stipulated sentence would be life with the possibility of
26 parole after ten years. *Id.*; Exh. 12. On August 8, 2007, Depenbrock failed to appear
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28 ¹ Exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 15, and are found at ECF Nos. 16-20.

1 for sentencing, and a bench warrant issued for his arrest. Exh. 10. After his arrest, the
2 state district court imposed the stipulated sentence of ten years to life, and judgment of
3 conviction was entered on February 21, 2008. Exhs. 12, 13.

4 Depenbrock filed a *pro se* motion for modification of sentence on April 15, 2008,
5 which the state district court denied. Exhs. 14, 17. On December 1, 2008, he filed a
6 proper person state postconviction petition for a writ of habeas corpus. Exh. 22. The
7 state district court denied the petition. Exh. 27. On February 3, 2010, the Nevada
8 Supreme Court affirmed the denial of the petition in part, reversed in part and remanded
9 for an evidentiary hearing on two claims: 1) whether his counsel was ineffective for
10 failing to file a direct appeal; and 2) whether he entered the guilty plea voluntarily,
11 knowingly, and intelligently because Depenbrock alleged that the State did not fulfill the
12 part of the plea agreement that provided for the dismissal of two other cases. Exh. 44.
13 The Nevada Supreme Court also concluded that the district court did not err in denying
14 ten other claims. *Id.*

15 On remand, the state district court appointed counsel, and Depenbrock filed a
16 counseled supplemental petition. Exhs. 46, 47. The supplemental petition indicated
17 that counsel's research revealed that the two other cases had in fact been dismissed,
18 per the guilty plea agreement. *Id.* The state district court held an evidentiary hearing
19 and subsequently denied the remaining claim. Exhs. 52, 59. The Nevada Supreme
20 Court affirmed the denial of the petition on May 10, 2012, and remittitur issued on June
21 6, 2012. Exhs. 77, 78.

22 Depenbrock dispatched his federal habeas petition for mailing on July 24, 2012
23 (ECF No. 6). Depenbrock's counseled, second-amended petition is before the court for
24 disposition on the merits (ECF No. 39). Respondents have filed an answer, and
25 Depenbrock replied (ECF Nos. 40, 45).

1 II. **Legal Standards**

2 **A. Antiterrorism and Effective Death Penalty Act (AEDPA)**

3 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty
4 Act (AEDPA), provides the legal standards for this court’s consideration of the petition in
5 this case:

6 An application for a writ of habeas corpus on behalf of a person in
7 custody pursuant to the judgment of a State court shall not be granted with
8 respect to any claim that was adjudicated on the merits in State court
proceedings unless the adjudication of the claim —

9 (1) resulted in a decision that was contrary to, or involved an
10 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

11 (2) resulted in a decision that was based on an unreasonable
12 determination of the facts in light of the evidence presented in the State
court proceeding.

13 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner
14 applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court
15 convictions are given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S.
16 685, 693-694 (2002). This Court’s ability to grant a writ is limited to cases where “there
17 is no possibility fair-minded jurists could disagree that the state court’s decision conflicts
18 with [Supreme Court] precedents.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The
19 Supreme Court has emphasized “that even a strong case for relief does not mean the
20 state court’s contrary conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538
21 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing
22 the AEDPA standard as “a difficult to meet and highly deferential standard for evaluating
23 state-court rulings, which demands that state-court decisions be given the benefit of the
24 doubt”) (internal quotation marks and citations omitted).

25 A state court decision is contrary to clearly established Supreme Court
26 precedent, within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that
27 contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state
28 court confronts a set of facts that are materially indistinguishable from a decision of [the

1 Supreme Court] and nevertheless arrives at a result different from [the Supreme
2 Court's] precedent." *Lockyer*, 538 U.S. at 73 (quoting *Williams v. Taylor*, 529 U.S. 362,
3 405-06 (2000), and citing *Bell*, 535 U.S. at 694.

4 A state court decision is an unreasonable application of clearly established
5 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), "if the state court
6 identifies the correct governing legal principle from [the Supreme Court's] decisions but
7 unreasonably applies that principle to the facts of the prisoner's case." *Lockyer*, 538
8 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The "unreasonable application" clause
9 requires the state court decision to be more than incorrect or erroneous; the state
10 court's application of clearly established law must be objectively unreasonable. *Id.*
11 (quoting *Williams*, 529 U.S. at 409).

12 To the extent that the state court's factual findings are challenged, the
13 "unreasonable determination of fact" clause of § 2254(d)(2) controls on federal habeas
14 review. *E.g.*, *Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir.2004). This clause
15 requires that the federal courts "must be particularly deferential" to state court factual
16 determinations. *Id.* The governing standard is not satisfied by a showing merely that the
17 state court finding was "clearly erroneous." 393 F.3d at 973. Rather, AEDPA requires
18 substantially more deference:

19 [I]n concluding that a state-court finding is unsupported by
20 substantial evidence in the state-court record, it is not enough that we
21 would reverse in similar circumstances if this were an appeal from a
22 district court decision. Rather, we must be convinced that an appellate
panel, applying the normal standards of appellate review, could not
reasonably conclude that the finding is supported by the record.

23 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir.2004); *see also Lambert*, 393
24 F.3d at 972.

25 Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be
26 correct unless rebutted by clear and convincing evidence. The petitioner bears the
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1 burden of proving by a preponderance of the evidence that he is entitled to habeas
2 relief. *Cullen*, 563 U.S. at 181.

3 **B. Ineffective Assistance of Counsel**

4 Ineffective assistance of counsel claims are governed by the two-part test
5 announced in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the
6 Supreme Court held that a petitioner claiming ineffective assistance of counsel has the
7 burden of demonstrating that (1) the attorney made errors so serious that he or she was
8 not functioning as the “counsel” guaranteed by the Sixth Amendment, and (2) that the
9 deficient performance prejudiced the defense. *Williams*, 529 U.S. at 390-91 (citing
10 *Strickland*, 466 U.S. at 687). To establish ineffectiveness, the defendant must show that
11 counsel’s representation fell below an objective standard of reasonableness. *Id.* To
12 establish prejudice, the defendant must show that there is a reasonable probability that,
13 but for counsel’s unprofessional errors, the result of the proceeding would have been
14 different. *Id.* A reasonable probability is “probability sufficient to undermine confidence in
15 the outcome.” *Id.* Additionally, any review of the attorney’s performance must be “highly
16 deferential” and must adopt counsel’s perspective at the time of the challenged conduct,
17 in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the
18 petitioner’s burden to overcome the presumption that counsel’s actions might be
19 considered sound trial strategy. *Id.*

20 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
21 performance of counsel resulting in prejudice, “with performance being measured
22 against an objective standard of reasonableness, . . . under prevailing professional
23 norms.” *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations and citations
24 omitted). When the ineffective assistance of counsel claim is based on a challenge to a
25 guilty plea, the *Strickland* prejudice prong requires a petitioner to demonstrate “that
26 there is a reasonable probability that, but for counsel’s errors, he would not have
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1 pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52,
2 59 (1985).

3 If the state court has already rejected an ineffective assistance claim, a federal
4 habeas court may only grant relief if that decision was contrary to, or an unreasonable
5 application of, the *Strickland* standard. See *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003).
6 There is a strong presumption that counsel’s conduct falls within the wide range of
7 reasonable professional assistance. *Id.*

8 The United States Supreme Court has described federal review of a state
9 supreme court’s decision on a claim of ineffective assistance of counsel as “doubly
10 deferential.” *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 129 S.Ct. 1411,
11 1413 (2009)). The Supreme Court emphasized that: “We take a ‘highly deferential’ look
12 at counsel’s performance . . . through the ‘deferential lens of § 2254(d).” *Id.* at 1403
13 (internal citations omitted). Moreover, federal habeas review of an ineffective assistance
14 of counsel claim is limited to the record before the state court that adjudicated the claim
15 on the merits. *Cullen*, 563 U.S. at 181-84. The United States Supreme Court has
16 specifically reaffirmed the extensive deference owed to a state court’s decision
17 regarding claims of ineffective assistance of counsel:

18 Establishing that a state court’s application of *Strickland* was
19 unreasonable under § 2254(d) is all the more difficult. The standards
20 created by *Strickland* and § 2254(d) are both “highly deferential,” *id.* at
21 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct.
22 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review
23 is “doubly” so, *Knowles*, 556 U.S. at —, 129 S.Ct. at 1420. The
24 *Strickland* standard is a general one, so the range of reasonable
applications is substantial. 556 U.S. at —, 129 S.Ct. at 1420. Federal
habeas courts must guard against the danger of equating
unreasonableness under *Strickland* with unreasonableness under §
2254(d). When § 2254(d) applies, the question is whether there is any
reasonable argument that counsel satisfied *Strickland*’s deferential
standard.

25 *Harrington*, 562 U.S. at 105. “A court considering a claim of ineffective assistance
26 of counsel must apply a ‘strong presumption’ that counsel’s representation was within
27 the ‘wide range’ of reasonable professional assistance.” *Id.* at 104 (quoting *Strickland*,

1 466 U.S. at 689). “The question is whether an attorney’s representation amounted to
2 incompetence under prevailing professional norms, not whether it deviated from best
3 practices or most common custom.” *Id.* (internal quotations and citations omitted).

4 **C. Instant Petition**

5 Depenbrock alleges that his counsel rendered ineffective assistance in violation
6 of his Fifth, Sixth, and Fourteenth Amendment rights when she failed to consult with him
7 regarding substantive appellate rights and time limitations for filing a direct appeal and
8 when she failed to file a notice of appeal despite Depenbrock’s repeated requests (ECF
9 No. 39, pp. 10-14).

10 The United States Supreme Court has held that the Constitution requires that
11 counsel consult with the defendant about an appeal when there is reason to think either
12 “(1) that a rational defendant would want to appeal (for example, because there are
13 nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably
14 demonstrated to counsel that he was interested in appealing.” *Roe v. Flores-Ortega*,
15 528 U.S. 470, 480 (2000). In making this determination, courts must consider all the
16 information counsel knew or should have known. The Court noted that “a highly
17 relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea,
18 both because a guilty plea reduces the scope of potentially appealable issues and
19 because such a plea may indicate that the defendant seeks an end to judicial
20 proceedings.” Courts must consider factors such as whether the defendant received
21 the sentence bargained for as part of the plea and whether the plea expressly reserved
22 or waived some or all appeal rights. “Only by considering all relevant factors in a given
23 case can a court properly determine whether a rational defendant would have desired
24 an appeal or that the particular defendant sufficiently demonstrated to counsel an
25 interest in an appeal.” *Id.*

26 In affirming the denial of this claim in the state postconviction petition, the
27 Nevada Supreme Court reasoned:
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1 At the evidentiary hearing, Depenbrock testified that he called his
2 counsel at least five times and left messages on her voicemail after he
3 was sentenced. When he did not receive a response from her, he sent
4 her a letter asking her to file an appeal, and she responded with a letter
5 stating that it was too late to file a direct appeal. Counsel testified that she
6 was never asked by Depenbrock to file an appeal until she received his
7 letter approximately three months after he was sentenced, at which time
8 she informed him that it was too late to appeal. Counsel stated that she
9 did not receive any voicemail messages from Depenbrock and that she
10 would have filed an appeal if he had asked her to do so. The district court
11 found counsel to be credible and determined that Depenbrock was not
12 denied a direct appeal. We conclude that the district court's findings were
13 based upon substantial evidence and were not clearly wrong, and
14 Depenbrock has failed to show that the district court erred in denying this
15 claim. See *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004)
16 (petitioner bears the burden of proving ineffective assistance); see also
17 *State v. Rincon*, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) ("[T]he
18 district court is in the best position to adjudge the credibility of the
19 witnesses and the evidence, and unless this court is left with the definite
20 and firm conviction that a mistake has been committed, this court will not
21 second-guess the trier of fact." (internal quotation marks omitted)).

22 Exh. 77, pp. 1-2.

23 At the state district court evidentiary hearing on this claim, Depenbrock testified
24 that after his February 21, 2008 sentencing he made at least five phone calls to the
25 Clark County Public Defender's office trying to reach his counsel in order to file a direct
26 appeal. Exh. 52, pp. 4-8. He stated that he first tried to contact counsel "probably the
27 following week" after he was sentenced. *Id.* at 5. He testified that he spoke to the
28 receptionist and also left voicemails for his counsel. He never received any response to
his messages. *Id.* at 6. Depenbrock sent his attorney a letter about May 31, 2008,
asking her to file his direct appeal. *Id.* He received a letter back from counsel that
stated that it was too late to file a direct appeal, but that she would file a motion to
withdraw as counsel so that Depenbrock could file a state postconviction petition. *Id.*

On cross examination, Depenbrock stated that he placed one or two of the five
phone calls to counsel more than thirty days after he was sentenced. *Id.* at 7.

The state district attorney asked:

1 Isn't it true in this [May 31] letter you don't state to [plea counsel] you
2 know, I've tried to call you several times and I haven't heard back from
3 you? It doesn't say that in this letter does it?

4 Depenbrock: No.

5 State: It only says that you wish to file an appeal in this case. And you
6 state some of the reasons that you believe that you have an appeal.

7 Depenbrock: Yeah. Sure.

8 State: And isn't it true that you received a response from Ms. Diefenbach
9 on June 10th?

10 Depenbrock: Yeah.

11 State: So that was a little over a week after you sent this letter? And she
12 informed you that the time had passed 'cause it'd been several months -

....

13 Depenbrock: Correct.

14 State: And she also then complied with your additional request that you be
15 provided your case file; isn't that right?

16 Depenbrock: Yeah. Correct.

17 *Id.* at 7-8.

18 Depenbrock's plea counsel also testified. *Id.* at 9-14. She stated that at the
19 conclusion of the sentencing hearing, Depenbrock commented "I will not do life." *Id.* at
20 11. She testified that she did not understand what he meant and thought perhaps he
21 meant he was going to take his own life. *Id.* Depenbrock did not say anything that
22 made counsel think he wanted to file a direct appeal. *Id.* Counsel had no contact with
23 Depenbrock within the first thirty days after he was sentenced. She checks her
24 voicemail several times a day, every day, and had no recollection of any voicemail
25 messages from Depenbrock. The first time she heard from Depenbrock was when she
26 received a detailed letter from him in early June asking her to start the appeal process,
27 suggesting possible claims, and directing her to certain case law. *Id.* at 12. Within a
28 week she responded in writing and told Depenbrock that the deadline to file an appeal

1 had expired and suggested that her office withdraw as his attorney so that he could
2 seek postconviction relief. *Id.* Counsel testified that she “absolutely” would have filed a
3 direct appeal if Depenbrock had asked her to do so and that she recalled no other time,
4 other than the May 31 letter, that he asked her to file a direct appeal. *Id.* at 13. On
5 cross examination, counsel stated that she did not send Depenbrock a closure-of-file
6 letter because it was not her practice to do so as a public defender. *Id.*

7 At the evidentiary hearing, the state district court supplemented the record with
8 letters from Depenbrock. *Id.* at 14. The court noted that Depenbrock had filed “quite a
9 bit with the Court,” but that he made no mention in any of the correspondence or filings
10 that he had ever requested or intended to pursue a direct appeal.

11 In its order denying the petition, the state district court credited Depenbrock’s
12 plea counsel’s testimony that Depenbrock never asked her to file a direct appeal and
13 that she saw no nonfrivolous issues to raise on appeal. Exh. 59, p. 4. The court
14 explained that it reviewed Depenbrock’s letters and found that Depenbrock did not send
15 a letter to his counsel until May 31, 2008, more than two months after the deadline to
16 file his notice of appeal had passed. *Id.* at 5. The court found that Depenbrock was not
17 denied a direct appeal. *Id.* Finally, the court stated that the second remanded claim
18 was belied by the record because the State complied with the plea negotiations and two
19 other cases were dismissed on July 14, 2008 and November 6, 2008 pursuant to the
20 plea agreement. *Id.*

21 Having reviewed the state-court record, this court determines that Depenbrock
22 has failed to demonstrate that the Nevada Supreme Court’s decision affirming the
23 denial of this claim was contrary to, or involved an unreasonable application of, clearly
24 established federal law, as determined by the U.S. Supreme Court, or was based on an
25 unreasonable determination of the facts in light of the evidence presented in the state
26 court proceeding. 28 U.S.C. § 2254(d). Accordingly, federal habeas relief is denied as
27 to ground 1.

1 The petition, therefore, is denied in its entirety.

2 **D. Certificate of Appealability**

3 This is a final order adverse to the petitioner. As such, Rule 11 of the Rules
4 Governing Section 2254 Cases requires this court to issue or deny a certificate of
5 appealability (COA). Accordingly, the court has *sua sponte* evaluated the claims within
6 the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v.*
7 *Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

8 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner
9 "has made a substantial showing of the denial of a constitutional right." With respect to
10 claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists
11 would find the district court's assessment of the constitutional claims debatable or
12 wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463
13 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable
14 jurists could debate (1) whether the petition states a valid claim of the denial of a
15 constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

16 Having reviewed its determinations and ruling in adjudicating Depenbrock's petition,
17 the court finds that reasonable jurists would not find its determination of any grounds to
18 be debatable pursuant to *Slack*. The court therefore declines to issue a certificate of
19 appealability.

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E. Conclusion

IT IS THEREFORE ORDERED that the second-amended petition (ECF No. 39) is **DENIED** in its entirety.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that the Clerk shall enter judgment accordingly and close this case.

DATED: March 13, 2018.



RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE